No. 11,018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Francis A. Garrecht, Senior Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now appellants Chevillard and Patron and petition that the decision of this Court rendered on June 12, 1946, be set aside and a rehearing of the cause be granted for the reasons hereinafter stated.

THE COURT ERRED IN HOLDING THAT THE ENTIRE RECORD HAD NOT BEEN BROUGHT BEFORE THE COURT.

The decision of this Court states that "the record does not contain all the evidence". In making this

statement the Court was in error. The bill of exceptions prepared on behalf of appellants Chevillard and Patron was settled by stipulation. (R. 290.) This stipulation alleged that the bill "sets forth all of the evidence and all of the proceedings relating to the trial of said defendants". The order of the trial judge settling the bill of exceptions (R. 291) likewise contains the statement that the bill is true and correct and "as containing all of the evidence and proceedings relating to the trial and conviction, motion for a new trial and motion in arrest of judgment of said cause".

As a matter of fact, the bill of exceptions contained all of the evidence produced at the trial and as admitted against either Chevillard or Patron. True, there was evidence in the case that was admitted solely against one or another of the defendants other than Chevillard or Patron but not having been admitted against appellants this was not evidence in the case against them. The decision should be corrected in this particular.

THE COURT ERRED IN HOLDING THAT THERE WAS NO ERROR IN LIMITING THE CROSS-EXAMINATION OF ELROY HINMAN AND DEAN HEUCK.

It will be remembered that when the witness Hinman was produced by the Government he testified that he was manager of the Ed Heuck Company. He further testified as to the signed delivery receipt or tag and that it was on the seat of the truck containing the 17,000 pounds of meat. This was elicited on direct examination. (R. 95.) He further testified that the

delivery tag was the document from which the Heuck Company prepared their bill against the War Shipping Administration for the collection of their charges. (R. 96.) He then testified as to what the delivery receipt or tag included.

On cross-examination the witness testified that the tag was prepared under his supervision, that he had general supervision over the preparation and sending of bills (R. 100), that he did not know whether the Heuck Company had sent to the Sea Perch or the War Shipping Administration meat equivalent to the amount that was in the truck on Sansome Street, that he had supervision of the books of the Heuck Company and that they would contain a record of what was billed against the United Fruit Company, War Shipping Administration, together with the quantity and amount of deliveries that the bill represented and that those books were under his general supervision. (R. 103.) At this point appellants requested the Court to order the witness to produce the books and the Court declined to do so.

Dean Heuck called by the Government testified as to the delivery receipt or tag (R. 104) and that the 17,000 pounds of meat which were put in the truck that was not delivered were included in the tag. (R. 105.) On cross-examination he was not allowed to answer the questions as to who was billed for the meat or whether his company was ever paid for the meat.

This Court upheld the limiting of the cross-examination as aforesaid on the ground that Hinman did not mention the books in his direct examination and that

no showing was made as to what facts, if any, appellants expected to prove by the books and that appellants' counsel "did not indicate the matter or matters as to which he desired to test the witness' recollection or to impeach his testimony". In upholding the ruling as to the witness Heuck this Court stated that the questions asked of this witness were properly disallowed because they related to matters about which the witness had not testified in his direct examination.

The importance of the matters sought to be elicited by appellants cannot be over estimated. Fraud was the gravamen and gist of the charges. Whether or not a fraud had been perpetrated, a fraudulent concealment indulged in or a conspiracy to have the Heuck Company file a false claim against the War Shipping Administration were matters of paramount importance in the trial. If, in fact, no fraud or concealment was perpetrated on the Government or its agency, if they knew by the bills that were sent for payment that 17,000 pounds of meat was not to be paid for or if the Government or its agency knew that the amount of meat had been supplied in another manner or at another time then no fraud was perpetrated upon the Government or its agency, no material fact was concealed.

This Court's opinion confines the rule of cross-examination within too narrow a limit. Cross-examination is a matter of right. It is not limited to the exact fact testified to by a witness on direct examination. It was not necessary that these witnesses mention a bill sent to the Government. If the general subject matter was

touched upon in direct examination it could be amplified on cross-examination in any manner pertinent to the issues.

The rule is that cross-examination should not be confined to the specific or particular questions asked on direct examination but the cross-examination should be confined to *the subject matter of the direct examination.* (*De Witt v. Skinner,* 232 Fed. 443; *Owl Creek Co. v. Goleb,* 232 Fed. 445, 448; *Union Trust Co. v. Woodrow Mfg. Co.,* 63 Fed. (2d) 602; *Heard v. United States,* 255 Fed. 829.) The subject matter of the direct examination was the meat that was delivered to the Sea Perch and the meat that was diverted from such shipment together with the delivery tag enumerating the various cuts and quantities of meat. The subject matter of the direct examination also was the delivery and nondelivery of meat to the Government, all of which was a predicate for the alleged fraud and concealment practiced upon the Government. To this extent all contemporary acts of the Heuck Company that would negative any fraud or concealment practiced upon the Government were proper subjects of inquiry upon cross-examination and the question of the billing made by the Heuck Company to the Government was directly connected with the amount of meat delivered to the Government.

In *Alford v. United States,* 282 U. S. 687, 75 L. ed. 624, the Supreme Court has expressly held (1) that cross-examination is a matter of right, (2) that cross-examination is necessarily exploratory, and (3) that

the cross-examiner need not disclose the purpose of his questions nor what he expects to elicit thereby.

If the cross-examination should have developed that the Government was advised that 17,000 pounds of meat were to be diverted from the shipment and that the Government was to receive either an additional 17,000 pounds or the bills were to be reduced by 17,000 pounds in amount, then the entire charges set forth in the indictment would have fallen. This was a vital matter in the case and to cut off all examination on this point *in limine* was prejudicial and reversible error. (*Alford v. United States,* supra.)

THE COURT ERRED IN HOLDING THE EVIDENCE SUFFICIENT TO ESTABLISH THE OFFENSE CHARGED IN COUNT TWO OF THE INDICTMENT.

The Court's opinion does not recite the evidence in the case and merely contains the statement that the evidence was ample to justify the conviction.

In considering the second count of the indictment we believe that the Court has confused the liability of a co-conspirator with the culpability of one charged with conspiracy. It must be remembered that the second count of the indictment did not charge conspiracy. It charged a substantive offense. Where one is charged with the crime of conspiracy he is chargeable as a co-conspirator with all acts done by other co-conspirators both before and during the accused's membership in the conspiracy. This, however, only

applies to where the question of being guilty of the crime of conspiracy is the issue. Where one is charged with a substantive offense the liability for independent acts of others involved in such substantive offense cannot be chargeable against the accused, where accused had no knowledge thereof.

The second count of the indictment charged the appellants with resorting to a trick and device to conceal a material fact from the War Shipping Administration and that this was accomplished by causing the War Shipping Administration to issue the receipt in question. There was no evidence showing that either Chevillard or Patron knew anything about a receipt to be signed or issued by the War Shipping Administration or that any such receipt had been signed or issued. The entire purloining of the truckload of meat could easily have been accomplished without the signing of any such receipt. In fact, the evidence fails to disclose that either Chevillard or Patron knew that the meat was to be delivered to the Government, their sole knowledge and belief being, *as repeatedly represented to them by Barral,* that the meat was to come from the meat company as meat of the meat company. We firmly believe that this point merits further consideration by this Court.

Furthermore, the opinion of this Court contains no reason showing how the issuance of any receipt by the War Shipping Administration, *i.e., an act of the War Shipping Administration,* could result in concealing a fact from the War Shipping Administration.

For like reasons the holding of this Court that count two of the information stated a crime is erroneous.

Dated, San Francisco,
June 10, 1946.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
June 10, 1946.

LEO R. FRIEDMAN,
Counsel for Appellants and Petitioners.